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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE COCHRAN FIRM, P.C.,

Plaintiff,

v.

THE COCHRAN FIRM LOS ANGELES, LLP; RANDY H. McMURRAY, P.C.; RANDY H. McMURRAY; and DOES 1-10,

Defendants.

AND RELATED COUNTERCLAIMS

Case No. CV12-05868-SJO (MRWx)

The Honorable S. James Otero

DEFENDANTS-COUNTERCLAIMANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S AND COUNTERDEFENDANTS' MOTION TO DISMISS

DATE: May 20, 2013
TIME: 10:00 a.m.
PLACE: Courtroom 1, Courtroom of the Hon. S. James Otero

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

I. INTRODUCTION.

McMurray's claims are all amply supported by the facts alleged in the Amended Counterclaims ("AC") which, if anything, provide more support than required under the pleading standards of each claim. The Counterdefendants ignore the fact that the RICO case statement must be considered part of the pleadings for the purposes of a 12(b)(6) motion. McMurray allegations provide Counterdefendants sufficient detail to identify the specific acts.

Nonetheless, now come Counterdefendants The Cochran Firm, P.C., Samuel Cherry, Keith Givens, and Barvie Koplow (collectively referred to herein as "Counterdefendants") with a procedurally deficient Motion to Dismiss whose most notable aspect is the degree to which it comprises argument over the facts. Counterdefendants' effort to impugn McMurray's factual narrative belies the Motion's lack of merit. While it is true that the facts are very complex, Counterdefendants' Motion comprises an ineffective, scattershot attack on select allegations, not a successful takedown of the RICO or other claims, and should be denied.

Documents Under Consideration.

McMurray's AC and RICO Case Statement ("RICO Stmt.") not only provide Counterdefendants with sufficient notice of the RICO claims, but also set out many distinct RICO predicate acts and injuries. Likewise, McMurray's fraud and other claims are pleaded with sufficient detail to meet the standards of Rules 8 and 9 of the Federal Rules of Civil Procedure.

Counterdefendants' section summarizing of McMurray's allegations is riddled with brash misrepresentations, spin, and editorialization. For example, Plaintiff makes a deceptive partial citation of paragraph 39 of the AC, Plaintiff's Mot. Dismiss 2:16-20, but Plaintiff's question is answered in the omitted portion of the same paragraph: McMurray made the payments "*in reliance on TCF-CCGSS's representations by Cherry that those payments would be forwarded to Cochran's*

estate." AC ¶ 39. McMurray respectfully requests the Court disregard Counterdefendants' misrepresentations and editorializing.

The two motions to dismiss pending before the Court by the various Counterdefendants are largely identical. As Plaintiff-Counterdefendant "The Cochran Firm, P.C" incorporated Counterdefendant Dunn's motion to dismiss, Mot. Dis. 7:9-10, so McMurray hereby incorporates his Opposition to Dunn's motion to dismiss.

III. DISCUSSION.

A. Legal Standard.

Motions to dismiss "are not favored and should be granted sparingly and with caution." *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201, 215-26 (6th Cir. 1961). A court must take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party. *Tamburri v. Suntrust Mortgage, Inc.*, 875 F.Supp.2d 1009, 1012 (N.D. Cal. 2012); *see also Columbia Natural Resources. Inc. v. Tatum*, 58 F.3d 1101,1109 (6th Cir. 1995). The RICO case statement is considered with the pleading and similarly construed. *Walter v. Drayson*, 538 F.3d 1244, 1247 (9th Cir. 2008). A claim must be pleaded with sufficient facts to state a claim to relief that is plausible on its face, and facial plausibility exists where there is sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Tamburri, Id. at 1012*., *quoting Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Inquiry is limited to the face of the pleading and incorporated material. *See Dann*, 288 F.2d at 215.

Under the foregoing standards, Counterdefendants' arguments throughout their Motion contesting the factual allegations are inappropriate. However, their doing so reveals that the AC must state the claims adequately, since Counterdefendants must resort to external facts to try to refute the claims.

B. Counterdefendants' Motion Fails to Establish There is No Plausible Basis for Relief in the RICO Claim.

Counterdefendants have presented a patchwork of cherrypicked facts as a

purported wholesale representation of the deficiencies in McMurray's pleading because the entirety of the Counterclaims amply state with the requisite specificity claims for which relief may be granted.

"In an action arising under RICO, any supplemental facts provided in a RICO case statement are likewise taken as true." *Sun City Taxpayers' Ass'n v. Citizens Util. Co.*, 847 F. Supp. 281, 284 (D. Conn. 1994), aff'd, 45 F.3d 58 (2d Cir.), cert. denied, 115 S. Ct. 1693 (1995). Indeed, the Ninth Circuit has recognized that in reviewing a ruling on a motion to dismiss a RICO claim, the standard of review is altered to take into account the RICO case statement: "We construe the complaint (and, in this case, also the RICO statement) in the light most favorable to the non-moving party, and we take the allegations and reasonable inferences as true." *Walter v. Drayson*, 538 F.3d 1244, 1247 (9th Cir. 2008); accord. *Sanville v. Bank of America*, 18 Fed.Appx. 500, 501 (9th Cir. 2001); *McLaughlin v. Anderson*, 962 F.2d 187, 189 (2nd Cir. 1992) ("on this motion to dismiss, we must take as true the facts as alleged in the complaint and as supplemented by the RICO case statement"). McMurray's RICO Statement and AC provide a detailed narrative of the parties, predicate acts, and injuries pertaining to the RICO claim, and the form of the Statement lends itself to clearly identifying the issues and bases of the claim.

Here, Counterdefendants' motion makes several claims of alleged defects in McMurray's RICO claim, yet had Counterdefendants read the RICO case statement that McMurray concurrently filed in accordance with the Court's March 20, 2013 Order, they would have seen that several victims and the nature of their injury (including detailed discussion of the predicate acts) have been clearly identified (RICO Stmt., Q.4, 5). They would also have read dozens more than the minimum required two-in-ten-years predicate acts detailed with specificity in response to Q.5(c), obviating their claim that McMurray has not alleged the minimum number of instances of bad conduct with sufficient particularity. Because the Motion to Dismiss *wholly* ignores these facts, the Court should reject it out of hand.

1. The AC alleges fraud-based predicate acts with sufficient particularity.

Rule 9(b) "only requires the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations," and it "does *not* require nor make legitimate the pleading of detailed evidentiary matter." *Walling v. Beverly Enterprises*, 476 F.2d 393, 397 (9th Cir. 1973). Likewise, this district court's ruling in *In re National Mortgage Equity Corp. Mortgage Pool Certificates Securities Litigation* ("*National Mortgage*") still stands that, in this Circuit, pleading the specific date, time, and content of communications are not necessary requirements for fraud-based RICO claims. 636 F.Supp. 1138, 1159 (C.D. Cal. 1986).

The *National Mortgage* holding rested on the reasoning of the Third Circuit Court of Appeals in *Seville Industrial Machinery Corp v. Southmost Machinery Corp.*, finding that "*Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.*"742 F.2d 786, 791 (3rd Cir. 1984) (emphasis added). For example, in *Seville*, where the alleged predicate acts were defendant's fraudulently inducing plaintiff to enter into a series of transactions to purchase equipment, and where plaintiff specified what machines were the subject of the alleged fraud, the court held that this sufficed under Rule 9(b) – even though the content of the alleged fraudulent communications was *not* given in the pleading. *Ibid.* Here, McMurray pleads all predicate acts with the required specificity; however, even if the Court were to find that some of the allegations are not sufficiently detailed, there are clearly numerous allegations sufficiently pleaded to sustain McMurray's claims.

In contrast to common law fraud, the aim of the mail and wire fraud statutes is to punish the scheme to defraud rather than the end result, and "[i]t is not necessary to establish that the intended victim was actually defrauded." *United States v. Allard* 926 F.2d 1237, 1242 (1st Cir. 1991). Accordingly, no showing of reliance is required.

Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 649 (2008); *Allard*, *supra*, 926 F.2d at 1242 (no detrimental reliance requirement). The same is true of a RICO claim based on an act of wire fraud. *Ibid.* Furthermore, mail and wire fraud need not be specifically pleaded as essential elements in the RICO scheme. *U.S. v. Shipsey*, 363 F.3d 962, 971 (9th Cir. 2004); *National Mortg.*, *supra*, 636 F. Supp. at 1159.

Counterdefendants fail to show how McMurray has not met the broadened pleading standard for a fraud-based claim under the RICO statute. Counterdefendants' entire argument consists of conclusory accusations and a list of citations to 3 to 4 dozen paragraphs of McMurray's ACs – *undiscussed and unargued*. Both ineffectual and baseless in light of the sufficiency of his pleadings, their Motion should be rejected.

2. McMurray has alleged cognizable RICO injuries.

a. The controlling standard in the Ninth Circuit under Newcal for a cognizable RICO injury is harm to a specific business or property interest.

Counterdefendants' assertion that McMurray has not sufficiently pleaded injury to business and property proximately caused by the predicate acts is exactly wrong. Their claim, that the standard for pleading a cognizable RICO injury is demonstration of "concrete financial loss", is baseless. The controlling Ninth Circuit rule is that "an injury is compensable under RICO if the injury constitutes harm to a specific business or property interest and if the alleged business or property interest is cognizable under state law." *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1055 (9th Cir. 2008) [internal quotations omitted].

In *Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005) the plaintiff alleged injuries amounting to little more than lost employment opportunities, and yet the Circuit ruled them sufficient. *Diaz*, *supra*, 420 F.3d at 900-901. The *Diaz* panel thus recognized that demonstrating harm to a property interest, which is "typically determined by reference to state law," was sufficient to plead a cognizable RICO injury. *Ibid.*

Even so, McMurray does plead several instances of concrete injuries to business and property interests, as well as specific financial losses, which are much more concrete than the lost employment opportunities pleaded in *Diaz* that were nonetheless found to satisfy RICO's injury pleading requirement. McMurray sufficiently pleaded injuries consisting of, *inter alia*: (1) loss of his well-known business that he built for over 13 years, AC ¶ 24, 25; RICO Stat. 7:20-24; (2) loss investments, AC ¶ 34-35, 38, 54-55; RICO Stat. 8:21-26, 11:12; (3) loss of diverted case revenues including the $750,000 Days Inn and $900,000 Washington settlements, AC ¶¶ 64-68; RICO Stat. 38:25-39:5; (4) IRS tax levies, AC ¶¶ 74-77; RICO Stat. 10:1-11:11; (5) EDD charges, AC ¶¶ 74-77; RICO Stat. 10:1-11:11; (6) credit card charges, AC ¶¶ 38, 56; RICO Stat. 9:17-20; (7) liens on tax refunds, AC ¶ 78; RICO Stat. 11:3-6; Frozen assets; (8) ruined credit; (9) ruined reputation; and (10) litigation expenses, AC ¶ 69; RICO Stat. 11:14-20.

As to proximate cause, McMurray's allegations are present and sufficient, *see, e.g.,* RICO Stmt., *Q.16;* AC, *para. 63, 64, 68, 73-75, etc.* Moreover, in this Circuit determining a showing of proximate cause requires evaluating factual questions and cannot be done on a 12(b)(6) motion, *Newcal*, *supra*, 513 F.3d at 1055.

These and other injuries to McMurray's business and property interests – as an individual, partner, and (now) largest creditor of TCLFA-GP – are pleaded in detail in the RICO cause of action and incorporated paragraphs as well as in the RICO Statement (answers to Q. 4, 15, 16). The Court should thus deny the Motion.

b. McMurray has a direct and actionable interest in TCFLA-GP's assets.

Counterdefendants make the absurd assertion that McMurray has no interest in the property of the dissolved partnership. Counterdefendants' citation to Cal. Corp. Code § 16203 misses the point, as McMurray is not alleging that TCFLA-GP's assets are his property. Rather, by diverting and embezzling the partnership's property, Counterdefendants have deprived McMurray of his *business and property interests in*

TCFLA-GP's assets and exposed him to related financial harm. See, e.g., AC ¶¶ 3, 33-35, 64, 101.

Moreover, the California Corporations Code grants partners very definite rights in the property of the partnership. For example, under the statutes partners hold definite property interests in (1) their contribution account, (2) partnership profits, and (3) funds loaned or advanced to the partnership – with interest. See Cal. Corp. Code, §§ 16401, subd. (a)(1), (b), (e). Accordingly, in California a partner can be held liable for conversion – or found guilty of embezzlement – for absconding with partnership funds because "stealing that portion of the partners' shares which does not belong to the thief is no different from stealing the property of any other person." *Oakdale Village Group v. Fong*, 43 Cal.App.4th 539, 546 (1996); accord. *In re Real Estate Associates Ltd. Partnership Litigation*, 223 F.Supp.2d 1109, 1134 (C.D. Cal. 2002).

Moreover, Counterdefendants cannot reasonably argue that McMurray must relinquish his right to sue for the abovementioned injuries in favor of the state court receiver for several reasons. A state court receiver in California does not own the property under his control, rather he is a mere trustee or custodian over it and as such he owes a fiduciary duty toward those who do have beneficial property interests in the receivership estate. *Shannon v. Superior Court* (1990) 217 Cal.App.3d 986, 993. It is McMurray, not the state court receiver, who owns the property interest.

A large portion of McMurray's claims and injuries can be characterized as Counterdefendants' wholly converting TCFLA-GP to their own use under the guise of "re-establishing" the Los Angeles office of "The Cochran Firm." Under that scheme: the assets of TCFLA-GP remain largely intact, having been fraudulently diverted to new ownership; and Dunn and Barrett are given control of those assets – McMurray is the *only* one who has been injured. Counterdefendant Dunn filed in federal district court a Notice of Firm Name Change representing that TCFLA-GP had merely *changed its name* to "The Cochran Firm California." AC ¶ 61.

Counterdefendants Cherry and Dunn submitted declarations stating that "The Cochran firm (sic) re-established its Los Angeles office" by giving Dunn permission to do business as The Cochran Firm California and hiring Dunn and Barrett as partners of that firm. Decl. Cherry ¶ 18, January 4, 2013; Decl. Dunn ¶ 5, January 4, 2013; Mem. P & A Mot. Prelim. Inj. 5:7-9. This "re-established" office, therefore, represents the nearly wholesale conversion of the assets of TCFLA-GP. McMurray clearly suffers direct injury in such a scenario, since the entire partnership has been virtually snatched away from around him in violation of his rights and interests.

It is clear from the discussion above that Counterdefendants' attack on McMurray's conversion claim is meritless. As a partner of TCFLA-GP, McMurray possessed definite business and property interests in TCFLA-GP and its assets.

3. McMurray's allegations of a pattern of racketeering activity are sufficient as a matter of law.

Section 1962(c) of the RICO statute is violated when a defendant participates in an enterprise's affairs "through a pattern of racketeering activity." The existence of a pattern is established by showing both "relatedness" and "continuity" with regard to the predicate acts that were pleaded. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240 (1989). Far from failing to plead these two elements with sufficient detail and plausibility, McMurray has taken great care to address them in the ACs and RICO Statement, in addition to describing the predicate acts themselves in great detail. See summaries at AC ¶¶ 87-88, 103, 110; RICO Stat. 11:21-13:24, 25:8-27:13.

a. McMurray has shown "relatedness."

Predicate acts are related if they have "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc.*, *supra*, 492 U.S. at 240. While it appears the establishment of one aspect of relatedness would thus be sufficient to defeat a motion to dismiss on this issue, *see Id.* at 250, the ACs allege the enterprise's acts were towards the same purposes: to siphon attorneys'

assets and avoid any share of liabilities. As alleged in the cases of Bolton, McMurray, Neal, Williams and Fisher, the acts achieved the desired results, and involved similar victims (two attorneys, three clients) and methods of commission. Clearly, these were not isolated events.

McMurray alleges that the several predicate acts are related in many ways, strengthening, not diminishing, the relatedness showing, and has shown striking similarities in the methods by which the enterprise deals with its attorneys and clients, all for the same purposes of helping the enterprise make and keep its money.

For example, McMurray alleges that Counterdefendants Cherry, Givens, and CCGSS used the ***same method*** to lure both Julian Bolton and McMurray to make investments into the "The Cochran Firm" enterprise and then oust them and deprive them of their interests as partners. *Cf.* AC ¶¶ 89-101 and ¶ 103, *see* ¶ 110; RICO Stat. 7:18-12:22. McMurray also alleges that the enterprise used ***the same method*** to lure in clients Hattie Neal, Jacqueline Williams, and Renna Fisher on the false pretense that they would be represented by a single nationwide firm and then escape liability for malpractice by disavowing the existence of that firm. *See* AC ¶ 45, 104; RICO Stmt. 12:23-13:24. McMurray also made other allegations of ***same purpose*** and ***same result***.

The arguments of Counterdefendants' instant Motion on this point are virtually identical with those of the co-pending motion of Counterdefendant Dunn, et al. McMurray refers the Court to his Opposition to Counterdefendant Dunn's motion to dismiss at pages 13:1-17:23.

b. McMurray has shown "continuity."

Counterdefendants either misstate or misapprehend the Supreme Court decision in *H.J. Inc.* to have given set definitions of closed-ended and open-ended continuity. That notion is false. Rather, in discussing these concepts the Court was clear to warn that, "[w]hether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case," and that, though it

would give examples of ways to establish continuity, those examples would not "cover the field of possibilities." *Id.* at 242.

The closed-ended type of continuity can be shown by string of related acts occurring over a finite period of time. Conduct extending over more than a few weeks or months is required. *H.J. Inc.*, *supra*, 492 U.S. at 242. But conduct extending for less than a year might very well suffice. *See Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995).

The open-ended type of continuity may be shown by predicate acts that "are part of an ongoing entity's regular way of doing business" so that there is a threat of continuing conduct. *H.J. Inc.*, *supra*, 492 U.S. at 242. Open-ended continuity may also be shown by specific predicate acts that "involve a distinct threat of long-term racketeering activity, either implicit or explicit." *Ibid.*

Here, McMurray has averred facts showing both closed- and open-ended continuity. RICO Stat. 25:8-27:13. At least from 2001 to the present day, Counterdefendants have been defrauding attorneys of their rightful partnership interests in law practices. See AC in general; RICO Stat. 7:18-12:22. Counterdefendants' falsely advertising "The Cochran Firm" to be one nationwide law firm is part of an ongoing "regular way of doing business," as their websites continue to make these representations to the public. AC ¶¶ 42-43.

McMurray has also pleaded facts showing that Counterdefendants' Cherry and Givens' ploy of using their invalid trademark registration for the name "The Cochran Firm" to influence the other partners and the employees of TCFLA-GP to, as it were, "come along quietly" and agree to become partners or employees of "re-established" offices of "The Cochran Firm" and injure business owners, as happened in Los Angeles, poses a distinct threat of continuing into the future. AC ¶¶ 56-61, 73, 80; RICO Stmt., Q.9. To the extent that the enterprise has the opportunity to defraud other attorney partners out of their interests in its "local offices" in the future, the use of the "The Cochran Firm" mark as a carrot (or bludgeon) to influence the remaining

members of the subject office to go along with the plan will likely continue. *Cf. H.J. Inc.*, *supra*, 492 U.S. at 242.

C. Fraud Is Pleaded in Compliance with Rule 9.

1. The role of each counterdefendant in fraudulent scheme is pleaded with requisite particularity.

Counterdefendants argue McMurray failed to plead with particularity the circumstances constituting fraud pursuant to FRCP 9(b). Counterdefendants here have adopted an argument that McMurray previously argued to this Court and which the Court rejected. The result here should be the same.

McMurray's earlier motion to dismiss argued that Plaintiff's fraud claim was defective because "it repeatedly lumps multiple defendants together and fails to allege facts establishing the role of each Defendant in the alleged fraud" Defendants' Memo. P. & A. 7:27-8:1, Dec. 20, 2012 (Doc. 42-3).

Counterdefendants' response was that "only one of [Defendants] is a natural person and that person *was an agent of the remaining Defendants* … It is therefore unnecessary to allege separate and distinct acts…." Opp'n 7-8 (emphasis added). In its order, this Court *agreed* with Counterdefendants and cited case law imposing liability "'upon an innocent principal …for torts of his agent …which are committed whether or not the agent …acts in excess of his authority.' *Garton v. Title Ins. & Trust Co.,* 106 Cal. App.3 d, 365, 375 (1980)." Order, Jan. 31, 2013, Doc. 66.

Likewise here, (setting aside, for the moment, McMurray's pleading that all Counterdefendants are members of an association-in-fact RICO enterprise) Counterdefendants, in their motion for preliminary injunction, averred the existence of an agency relationship between themselves and Counterdefendants Dunn and Barrett. Counterdefendants declared to the Court that Dunn and Barrett were "re-hired" by Cherry and Givens, who are officers and shareholders of Counterdefendant CCGSS. Decl. Cherry ¶ 18, Doc. 55-3; Decl. Dunn ¶ 5, Doc. 55-4; Mot. Prelim. Inj. 5:7-8, Doc. 55-1. McMurray also alleges that Koplow was hired by Dunn as an

employee of the "re-established" office, and was at his direction remotely accessing and altering the TCFLA-GP firm's electronic database. RICO Stat. 5:14-20.

Thus, the Court should deny the instant Motion on this point and rule McMurray's pleading of the roles of the parties in the alleged fraud sufficient.

2. Justifiable reliance argument is not appropriate for a determination on motion to dismiss.

Counterdefendants argue that Cherry and Givens did not owe McMurray any duty to disclose the trademark registration during the negotiations over Los Angeles office because McMurray was not yet a partner when the non-disclosure occurred, and also because McMurray was not an equity partner of TCF. Mot. 3:7-15.

However, the SAC takes a different position: "Plaintiff's reliance on [McMurray's] representation was justified because [McMurray was] in ***partnership*** and fiduciary relationship." SAC ¶ 116. Counterdefendants are now estopped from arguing that because he was not a partner, McMurray's reliance on ***their*** representations was not justified. Counterdefendants also argue that McMurray cannot support a fraud claim with regard to the concealment of the "bogus" loans reported in his corporate tax returns because McMurray failed to plead reliance "on the loans nor justifiable reliance." Mot. 13:23-24. McMurray did not plead reliance as to the loans because he could not rely on what he *did not know existed*. The theory pleaded here is fraudulent *concealment*. McMurray relied on Koplow, who was in a relationship of confidence with McMurray and handled his own and his corporation's tax returns. AC ¶ 38, 126-129.

D. McMurray Properly Pleaded Interference With Prospective Economic Advantage.

To properly plead an interference claim, McMurray needs to show only a "colorable economic relationship" that has "the potential to develop into a full contractual relationship." *Buckaloo v. Johnson,* 14 Cal. 3d 815, 828-29 (1975). As courts have held in other contexts, the "reasonable probability" required by this

standard is established simply by showing *more than an abstract chance* of success. *College Hospital, Inc. v. Superior Court,* 8 Cal. 4th 704, 715 (1994); *In re Willon,* 47 Cal. App. 4th 1080, 1097-98 (1996).

McMurray has pleaded facts showing more than a merely "abstract chance" of economic advantage as a partner of TCFLA-GP who each day presented a reasonable probability that new clients would be retained by TCFLA. AC ¶ 133. With each new client, there is a prospective business advantage because each new client brings with them the reasonable probability of attorney's fees gained through settlements or verdicts. As a partner of TCFLA, McMurray would be entitled to portion of these attorney's fees for each new client of TCFLA. However, because of Counterdefendants' wrongful ouster of McMurray from TCFLA, Counterdefendants interfered with McMurray's prospective economic advantage. AC ¶135; *see also, e.g.*, ¶¶ 69-71 (block on McMurray's electronic communications demonstrates that McMurray's ouster deprived him of the reasonable probability that he would financially benefit from the new clients of TCFLA).

According to Counterdefendants, if the other causes of action are dismissed, the claim for interference with prospective business advantage must be dismissed as well. (Counterdefendants' Motion to Dismiss, 14:24-28) However, the converse holds true as well. McMurray's interference claim cannot be dismissed if any of McMurray's nine other claims remain. Therefore, Counterdefendants' motion to dismiss McMurray's interference claim must be denied.

E. Plaintiff's Licensee Estoppel Has No Merit

Counterdefendants incorrectly argue that, as an alleged former licensee, McMurray is now "estopped "to challenge the mark's validity." However, in cases where licensee estoppel has been applied, the party against whom it was applied had either agreed in the license and/or plead in its complaint, stipulated or judicially admitted in some other ***unequivocal*** manner that the party asserting estoppel had valid trademark rights, would not contest or was not contesting the validity of the

mark and/or that it was a licensee of the mark at issue. *See e.g., Pacific Supply Coop. v. Farmers Union Central Exchange.* 318 F.2d 894. 907-909 (9th Cir 1963): *Seven-Up Bottling Company v. The Seven-Up Company,* 561 F.2d 1275, 1279 (8th Cir. 1977). Counterdefendants' assertion is contradicted by Plaintiff's Second Amended Complaint, which avers that "McMurray informed his partners in The Cochran Firm Los Angeles of his belief that he had a right to use of THE COCHRAN FIRM name *without a license* agreement" SAC ¶ 114. Counterdefendants are now attempting to argue that McMurray was "implied licensee", which was never the case. Further, Counterdefendants alleged *without any citation* to the AC that McMurray alleges that if a formal partnership agreement had been reached between TCFLA-GP and "National" it would have contained a license to use the mark. Motion pp.15, 18-21. In fact, McMurray pleads that the 2007 partnership agreement specifically states that each partner has an independent right to use the "Cochran" name (AC ¶ 35), and the payments made to the TCF-CCGSS were pursuant to representations by Cherry that those payments would be forwarded to **Cochran's estate** (¶ 39). No trademark license agreement was ever entered into between Plaintiff and McMurray or CCGSS and McMurray, neither individually nor as a managing partner of TCFLA–GP. The Parties have not by writing *or "implication"* emplaced terms governing goodwill in connection with the mark, nor quality control, nor were those terms contemplated in any unsigned draft agreement provided to McMurray(AC ¶ 154).The gravamen of McMurray's AC is that Counterdefendants have never had the *exclusive* right to use the "Cochran" name, and McMurray owns rights in the mark. ¶ 140. Upon learning of the existence of the registration, McMurray immediately initiated a formal cancellation proceeding. There is no "implied" license where by Counterdefendants' own admission, the parties never agreed on ownership of rights in the purportedly licensed mark.

In any event, former licensees may challenge the validity of the mark if such challenge is based upon facts which arose after the license expires. *See WCVB–TV* v.

Boston Athletic Ass'n, 926 F.2d 42, 47 (1st Cir.1991) (nothing preventing a challenge by a prior licensee based upon facts learned after license expired;, trademark holder not permanently immunized from legal attack); *In re Houbigant*, 914 F.Supp. at 993; *National Council of Young Men's Christian Ass'ns v. Columbia Young Men's Christian Ass'n*, 8 U.S.P.Q.2d 1682, 1686 (D.S.C.1988)." *STX, Inc. v. Bauer USA, Inc*., C 96-1140 FMS, 1997 WL 337578 (N.D. Cal. June 5, 1997).

McMurray pleaded that he first learned of the existence of the federally registered trademark from the February 6, 2012 cease and desist letter. McMurray quickly filed a petition for cancellation of the mark on March 23, 2012. Clearly, any alleged "implied" license expired upon transmission of the letter, and upon learning that the right to use the name that was supposed to be the asset of the LLP had been assigned by the Cochran estate in late 2007 without McMurray's knowledge.

Thus, even if McMurray is found to be a former licensee, he has standing to challenge the mark based upon facts he learned after the purported license expired.

F. McMurray's Lanham Act Claims Are Sufficiently Pleaded.

1. Counterdefendants' argument comprises factual dispute insufficient to sustain a motion to dismiss under Rule 12(b).

Counterdefendants' arguments with respect to McMurray's Lanham Act claims are a specious attempt to conflate disputed facts with matters of law. From the beginning of their argument, Counterdefendants obsess over whether the facts alleged in the fifth counterclaim are true because they know that under the standards of Rule 12(b), the claim stands when the facts as pleaded are taken as true on their face. This is also true of the California Right of Publicity Claim, which should survive and defeat Counterdefendants' instant Motion for the same reason.

Numerous averments of fact throughout the AC provide ample support for McMurray's claims that TCF has misrepresented itself as a "nationwide" law firm. The parties disagree whether TCF's structure is a law firm at all, much less a law firm under the definitions and guidelines promulgated by the ABA and various state

licensing authorities where the Counterdefendants purport to have a "licensed" business presence, including without limitation in California under State Bar rules of ethical conduct. TCF's self-serving and conclusory declaration that it is a "single, national firm" elides numerous factual allegations in the AC demonstrating how TCF has in other venues averred facts to the contrary – indeed, contrary to its very claimed existence as a legal entity – and is thus insufficient to defeat McMurray's Lanham Act claims.

2. Counterdefendants have no rights to use McMurray's identity.

Counterdefendants' claim that McMurray has alleged no actionable misrepresentation or false advertising because McMurray was allegedly a partner of TCF in the past is incorrect and should be dismissed. Counterdefendants appear to argue they are entitled to continue referring to McMurray as a "Managing Partner" of the purported firm and to use his name, likeness and identity (including his accomplishments and reputation for excellence before the bar) to promote The Cochran Firm, apparently on an indefinite basis. However, McMurray did not allege that he was in partnership with TCF; in fact, no partnership agreement was ever concluded with the enterprise, nor between TCFLA-GP and either TCF or TCF-CCGSS. *See, e.g.,* AC, ¶154. Moreover, McMurray had been dissociated from even the Los Angeles Office since early 2012. Thus, there was no partnership during the period of the misrepresentation, passing off, and false advertising alleged in the AC and the Motion fails.

Thus, holding McMurray out as "Managing Partner" of TCF under any of the circumstances alleged in the ACs is false and misleading conduct.

3. Counterdefendants' conduct and arguments obviate any "irreparable injury" that gave rise to their preliminary injunction.

The gravity of Counterdefendants' misconduct is laid bare by the brazenness of

their current position vis. their earlier arguments in this action. McMurray avers and produced Exhibits to show that the complained-of conduct was ongoing at least as late as February 8, 2013 – weeks after TCF sought and was granted a preliminary injunction against McMurray, and a year after Counterdefendants' sent him their cease and desist letter. TCF and Cherry persuaded this Court that any association of McMurray with "THE COCHRAN FIRM" – especially in the capacity of "Managing Partner" – would cause Counterdefendants irreparable injury. Now, by contrast, TCF and Cherry argue that their holding him out as "Managing Partner" of "The Cochran Firm" (and not merely of the L.A. office) as alleged in McMurray's pleading is not only a truthful statement but is also apparently perfectly acceptable conduct. Counterdefendants' position militates in favor of this Court immediately lifting the injunction. In any event, for the purposes of their instant Motion, Counterdefendants have merely presented a counter narrative of facts, not a legal basis upon which to dismiss McMurray's claims.

4. The false advertising claim is sufficiently pleaded.

McMurray pleaded with specificity the false advertising claim against Counterdefendants sufficiently to defeat their Motion to Dismiss. Their flagrant bowdlerization of McMurray's claim demonstrates the weakness of Counterdefendants' argument. The claim that the Lanham Act claims refer only to "false and misleading descriptions and representations of fact in connection with…legal services and firm composition and expertise on their website and commercial advertising and promotion" and are thus "too vague" is false. Counterdefendants have omitted the prefatory phrase, "[a]s alleged herein," that is in ¶175. The pleadings clearly do provide the required specificity regarding the Counterdefendants' false advertising, for example in the detailed discussion of the false and misleading "Cochran Firm brochure" beginning at ¶¶ 157 through 162 and ¶177 of the AC. The discussion of Counterdefendants' false advertising of McMurray as "Managing Partner" of their enterprises and entities after he was no longer

associated with the firm in AC ¶¶ 178 and 179 is likewise specific. Counterdefendants comprise both licensors and named partners of the licensee entity; there is no question that they all share in responsibility for the obviously misleading content on the Illinois licensee's web site. False advertising is sufficiently alleged to defeat the Motion to Dismiss.

5. "Passing off" exists to address the claimed misconduct.

Counterdefendants' argument that McMurray's passing off / reverse passing off claim is improper and must fail is similarly meritless and must fail. "Passing off" refers to the misrepresentation of the goods or services one is offering as coming from another party, and is designed to prevent consumers from misrepresentation as to association. As plainly evident in Exhibit D of the AC and the discussion pertaining thereto therein and above, Counterdefendants misled consumers to believe McMurray was associated with them and that he was responsible for legal services provided by them in Illinois (and potentially in other states where McMurray is unlicensed to practice). They fostered the misleading impression that McMurray's expertise and skill as a trial lawyer and managing partner were part and parcel of the legal services that they offered and provided – which was never true in Illinois. Their conduct is precisely what the tort of passing off was intended to countervail. For this reason, the claim should stand.

G. McMurray Pleads His Right to Publicity Claim with Sufficient Clarity.

Plaintiff argues that McMurray's publicity claim has not been sufficiently pleaded because "McMurray fails to allege a plausible theory under which Plaintiff can be held liable for an Illinois licensee's actions on its website." Plaintiff's Mot. Dismiss 18:25-26. This assertion is wrong: McMurray's claim explicitly alleges that Plaintiff and Counterdefendants assist with and approve advertising for Plaintiff's various "local offices" around the country and so directed the Illinois offices use of McMurray's likeness. AC ¶ 183.

Moreover, Plaintiff forgets that it itself reported to this Court with regard to its structure: "Each office is set up as a separate entity, which entity then *enters into a partnership agreement* with Plaintiff." Plaintiff's Opp. Memo. P & A 10:11-12, Aug. 20, 2012. The opposition further states that "Plaintiff exercises actual control over each of the partnership to which mark is licensed through its operating procedures and ***retains the right to exercise future control***… which right it expressly reserves in ***every*** partnership agreement by which the licenses are granted." Doc. 14 at 10:10-20. Therefore, since, pursuant to general principles of agency law, "each partner is an agent of the partnership," Plaintiff cannot reasonably deny that it is liable for the actions of its admitted partner and agent, the "Illinois licensee." See Order 4, Jan. 21, 2013. Additionally and significantly, since Cherry and Givens are named partners of the Chicago licensee entity, the argument that they had no control over their own conduct is farcical at best and should not be taken seriously – *they are the licensee*. Moreover, McMurray alleges that his name and likeness were used without his consent. AC ¶ 183. These features appear on the face of the statute. See Cal. Civil Code § 3344(a). McMurray has satisfied the burden to properly plead the claims.

H. McMurray's Fraudulent Conveyance Claim Is Correctly Pleaded.

McMurray's claims under California Civil Code § 3439 et seq meet the requirements of Rule 18 and allege the requisite facts under the statute.

Plaintiff's argument that "a partner is not a 'creditor' of a partnership within the meaning of the statute is incomplete, as Plaintiff does not provide any authority to support its argument. The statute provides its own definition of creditor: "'Creditor' means a person who has a claim…." Cal. Civil Code § 3439(c). A "claim" under the statute is "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Cal. Civil Code § 3439(b). In other words, the definition is quite broad. McMurray's position as creditor stems from his

partnership in TCFLA-GP and his right to distribution and collection of loans made thereto. AC ¶ 208; see Cal. Corp. Code §§ 16401(a), (e), § 16807(a) (speaks of "partners who are creditors").

Plaintiff's argument that McMurray failed to allege that the debtor, TCFLA-GP, reflects a misunderstanding of the statutory scheme. Insolvency is not an element of a claim under § 3439.04 – McMurray's allegation of actual intent to defraud is sufficient for that purpose. AC ¶ 209. Moreover, though insolvency is an element of a claim under § 3439.05, Plaintiff failed to apprehend that McMurray's allegation that TCFLA-GP would incur debts beyond its ability to pay them satisfies the definition of insolvency under § 3439.02(c). AC ¶ 209. *Accord. Albertson v. Raboff*, 185 Cal.App.2d 372, 387 (1960).

IV. CONCLUSION.

For the foregoing reasons, Counterclaimants Randy H. McMurray, P.C. and Randy H. McMurray respectfully contend that the motion to dismiss of Plaintiff and Counterdefendants should be denied. If the Court should be inclined to grant the instant motion to dismiss on any grounds, McMurray hereby requests leave and a reasonable period of time to amend his Counterclaims to cure the defect.

Dated: April 29, 2013

Respectfully submitted,

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